Filed 1/28/10 In re C.F. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re C.F. et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. S.B., Defendant and Appellant.	F058193 (Super. Ct. Nos. 04CEJ300172-1, 2) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Jane A. Cardoza, Judge.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, Interim County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Vartabedian, A.P.J., Gomes, J., and Kane, J.

S.B. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her two daughters.[1] Mother challenges the superior court's earlier decision denying her reunification services based on her history of extensive, abusive, and chronic use of drugs (§ 361.5, subd. (b)(13)). She also contends the superior court erred by not finding that termination would be detrimental to the children based on their relationship with her. On review, we affirm.

PROCEDURAL AND FACTUAL HISTORY

On April 30, 2008, respondent Fresno County Department of Children and Family Services (department) detained mother's four- and two-year-old daughters and on May 2, 2008, initiated the underlying proceedings. The children were at substantial risk of being sexually abused (§ 300, subd. (d)) by their mother's male friend who was a member of the children's household. He was a registered sex offender. Only a week earlier, his parole agent informed mother that the man could not have any contact with children. Despite having this information, mother continued to allow the man access to her children. In addition, the younger child's father was incarcerated in state prison and had not made any provision for the child's care. (§ 300, subd. (g).)

At the time the children were detained, there were concerns that mother was under the influence of a controlled substance. However, she denied she had used.

Soon after the start of the dependency proceedings, mother made herself largely unavailable to her children as well as to the department and the court. Although the department originally offered her services, she failed to comply except to participate in a May 7, 2008, addiction severity inventory (ASI) assessment and enroll and discharge herself from an in-patient treatment program in August 2008. For the most part, she did not attend scheduled visits with the children. Eventually in July 2008, she was taken off

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

calendar for visits due to her "no show" status. Despite receiving notice, mother also did not attend an October 2008 hearing at which the court exercised its dependency jurisdiction over the children under section 300, subdivisions (d) and (g). Furthermore, she did not attend the dispositional hearing eventually conducted in February 2009.

At the February 2009 hearing, the Fresno County Superior Court adjudged the children dependents and removed them from parental custody. It also denied mother, as well as each child's father, reunification services under various subdivisions of section 361.5. In mother's case, as previously mentioned, the court denied her services based on her history of extensive, abusive, and chronic use of drugs (§ 361.5, subd. (b)(13)). Having denied each of the parents reunification services, the court set a section 366.26 hearing to select and implement a permanent plan for the children.

The department subsequently prepared a report in which it recommended the court find the children adoptable and terminate parental rights. Because it is undisputed that the children are likely to be adopted, we need not summarize the department's evidence on that point here.

Relevant to this appeal, the report detailed that since the court set the section 366.26 hearing and the department transferred the case to its assessment unit, there were twice-weekly one hour visits available to mother. However, her visits were inconsistent. In May 2009, she appeared for more visits than usual but even then she attended visits once rather than twice a week. During three visits, one each in March, May, and June 2009, the social worker observed that the children, and especially the older of the two, had a difficult time obeying and listening to mother. The children were also easily distracted and walked away during those visits. Mother resorted to bribing the children in order for them to return to the visitation room.

In July 2009, the court conducted its section 366.26 hearing. Mother attended the hearing and testified that in her opinion she had a loving relationship, as well as a parent-

child bond, with the children. The children had lived with her for their entire lives and were excited, as well as happy, to see her at visits. She did not agree with the department's recommendation to terminate parental rights. In her view, she was capable of taking care of the children and would be willing to proceed with some reunification plan.

On cross-examination, mother admitted that the older of the two children had been out of mother's custody due to other dependency proceedings between 2004 and 2006.

Having found the children were likely to be adopted, the court terminated parental rights.

DISCUSSION

I. Denial of Reunification Services

A. Appealability

An order denying reunification services is ordinarily not reviewable on appeal from a termination order. However, this rule does not apply if the superior court has not properly notified a parent, who is denied services at the same time the court sets a section 366.26 hearing, of the parent's appellate remedy by way of a writ proceeding (§ 366.26, subd. (*l*)(3)(A); *In re Cathina W.* (1998) 68 Cal.App.4th 716, 724.) In this case, the superior court clerk failed to so notify mother at her last known address. Consequently, mother is entitled to raise her challenge to the order denying her services on this appeal. (*Ibid*.)

B. Section 361.5, subdivision (b)(13)

The superior court denied mother reunification services pursuant to section 361.5, subdivision (b)(13). According to this provision and relevant to this case, reunification services need not be provided to a parent when the court finds by clear and convincing evidence:

> "[t]hat the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention . . . ." (§ 361.5, subd. (b)(13).)

There is no dispute that mother has a history of extensive, abusive, and chronic use of drugs and alcohol and there was prior court-ordered treatment for her problem. Mother, who was 43 years old at the time the petition was filed in these proceedings, started abusing drugs and alcohol in her teens and while in high school. She reported that during her lifetime, she used on a regular basis: alcohol to intoxication for 16 years, amphetamines for 26 years, and cocaine for at least 12 years. In 2004, the court removed the older of the two children, C.F., from parental custody due to caretaker absence caused by mother's cocaine addiction and ordered drug treatment for her. Mother completed drug treatment in 2005.[2]

Mother assumes an admission she made -- that she used drugs following the children's detention on April 30, 2008 -- is the only evidence of her drug usage in the preceding three years. She goes on to argue this was merely evidence of a relapse rather than evidence of resistance to the prior court-ordered treatment. She relies on some decisions which recognize a distinction between a brief relapse and resistance to treatment. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383; *Karen H. v. Superior Court* (2001) 91 Cal.App.4th 501, 504; see also *Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, 780.)

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[2] It appears that following a 12-month review of reunification services conducted in October 2005, the court authorized C.F.'s placement with mother under family maintenance services. The younger of the two children was born the preceding month and apparently was not the subject of dependency proceedings upon her birth. In late March 2006, the court dismissed its dependency jurisdiction over C.F.

C. *Standard of Review*

Mother seeks our de novo review, rather than substantial evidence review, of her argument. She claims the facts are essentially undisputed and the issue is primarily one of statutory interpretation. (*D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 203.) We disagree.

The court in *D.B. v. Superior Court, supra,* did conduct a de novo review of a denial of services pursuant to the same subdivision as here, section 361.5, subdivision (b)(13). However, it did so to resolve the legal question of whether a parent's drug relapses, in violation of the parent's parole conditions, amounted to resistance of court-ordered treatment. (*D.B. v. Superior Court, supra,* 171 Cal.App.4th at p. 202.)

Here, mother's relapse argument is not a legal one. Rather, it is a factual claim, based on her reading of the record that she only relapsed once the children were detained. Under these circumstances, we apply the substantial evidence test. (See *In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.)

D. Analysis

The evidence regarding the three-year period immediately prior to May 2, 2008, when the petition was filed, comes largely from two sources. One is a summary of a May 2, 2008, team decision making (TDM) meeting with the department in which mother participated. The other is the ASI assessment of mother following the evaluator's May 7, 2008, interview of her.

Prior to and during the TDM meeting, mother refused to drug test. During a break in the TDM meeting, she told a social worker that she used drugs on the night following her children's removal. Mother stated she took some Darvocet, diet pills, and smoked a substance out of her friend's glass pipe. She thought the substance was a drug although she was unsure what it had been. She was certain based on her history of cocaine use that

the substance was not cocaine. She also stated she last used drugs, namely cocaine, in 2006.

According to the ASI assessment, mother reported using amphetamines on a regular basis for 26 years, starting when she was in high school, and using amphetamines twice during the preceding 30 days. She also reported using specifically methamphetamine two times in the past 30 days. She reported "her first meth use at age 43." Parenthetically, mother turned 43 approximately 46 days before the children were detained.

Mother added she was slightly bothered by her drug problems during the past 30 days but did not see a need for treatment. While she claimed her last reported cocaine use was about three years earlier, she stated "her drug of choice *is* powder cocaine." (Italics added.) She stated she previously had been in three treatment programs, including the program she completed in 2005 and a program that she dropped out of in 2006.

In addition, mother arrived 1.5 hours late for her ASI assessment interview. Her eyes were red and moved rapidly while she was extremely talkative and seemed to be in motion most of the time. Confronted with the evaluator's suspicion that she was under the influence of a stimulant, mother denied it, stating she might have bipolar condition. There is no record evidence other than mother's suggestion, however, that she had been diagnosed with such a condition. In the evaluator's opinion, mother's honesty seemed to be questionable at best. After refusing to drug test, mother admitted if tested she would test positive.

Even if the superior court were to believe the majority of mother's statements, it properly could find that she had resisted treatment in the three years before May 2, 2008, when the petition was filed. Resistance to prior treatment for chronic use of drugs may be shown where the parent has participated in a substance abuse treatment program but

continues to abuse illicit drugs. (*In re Levi U.* (2000) 78 Cal.App.4th 191, 200.) While mother completed court-ordered drug treatment in 2005, she admittedly used cocaine in 2006 and dropped out of another treatment program in 2006. Also, given her current age, her age when she started using amphetamines, and her 26-year history of regularly using amphetamines, the court could also reasonably infer that mother had abused amphetamines during part, if not all, of the three years. Further, the mother's behavior at her ASI interview contradicts her claim that she merely suffered a brief relapse on the day the children were detained. We conclude, therefore, that there was substantial evidence to support the court's finding pursuant to section 361.5, subdivision (b)(13).

II. Beneficial Parent Child Relationship

Mother also contends the court should have found that termination would be detrimental to the children under section 366.26, subdivision (c)(1)(B)(i) because, in mother's view, they shared a beneficial relationship. She argues there was no substantial evidence to support the superior court's rejection of her claim. As discussed below, her claims are both legally and factually meritless.

To begin, although section 366.26, subdivision (c)(1)(B) acknowledges termination may be detrimental under specifically designated circumstances, a finding of *no* detriment is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) The statutory presumption is that termination is in the child's best interests and therefore not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) It is the parent's burden, instead, to show that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) Thus, when a court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim, as mother argues here, but whether the juvenile court abused its discretion in so doing. (*In re Jasmine D.*,

supra, 78 Cal.App.4th at p. 1351.) On review of the record, we find no abuse of discretion.

The beneficial parent/child exception in section 366.26, subdivision (c)(1)(B)(i) involves a two-part test: first, did the parent maintain regular visitation and contact with the child(ren) and second, would the child(ren) so benefit from continuing the relationship with the parent that it would outweigh the benefit of adoption. (§ 366.26, subd. (c)(1)(B)(i); *In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.)[3] Mother met neither part of this test. As summarized above, mother failed to both maintain regular visitation and contact with her children and show severing their relationship would deprive the children of a substantial, positive emotional attachment such that they would be greatly harmed (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342).

The court consequently did not abuse its discretion by rejecting mother's argument. (See *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.)

DISPOSITION

The order terminating parental rights is affirmed.

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3 For the beneficial relationship exception to apply,

> "the parent-child relationship [must] promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: 'balance ... the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id*. at p. 575.)" (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.)